(3)

Supreme Court, U.S.
FILED
SEP 1 2000

No. 00-90

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, *et al.*,
Petitioners,

v.

GRANT BAKER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

WALTER E. DELLINGER
(*Counsel of Record*)
JOHN F. DAUM
PAMELA A. HARRIS
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Petitioners

15pp

TABLE OF CONTENTS

Page

PETITIONERS' REPLY BRIEF 1

ARGUMENT 2

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bose Corp. v. Consumers Union, Inc.,
466 U.S. 485 (1984) 1, 4

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990). 4

Director, OWCP v. Greenwich Collieries,
512 U.S. 267 (1994) 9

Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,
456 U.S. 844 (1982) 4

Medina v. California,
505 U.S. 437 (1992) 9

Mattox v. United States,
146 U.S. 140 (1892) ..... *passim*

Pullman-Standard Co. v. Swint,
456 U.S. 273 (1982) 4

Raleigh v. Illinois Department of Revenue,
120 S. Ct. 1951 (2000) 9, 10

Remmer v. United States,
347 U.S. 227 (1954) ..... *passim*

Rinker v. County of Napa,
724 F.2d 1352 (9th Cir. 1983) 9

Rushen v. Spain,
464 U.S. 114 (1983) 5

Speiser v. Randall,
357 U.S. 513 (1958) 8

TABLE OF AUTHORITIES
(continued)

Page

United States v. Dutkel,
192 F.3d 893 (9th Cir. 1999).....9

United States v. Littlefield,
752 F.2d 1429 (9th Cir. 1985).....9

United States v. Olano,
507 U.S. 725 (1993).....3

United States v. Sanders,
962 F.2d 660 (7th Cir. 1992).....5

RULES

Fed. R. Evid. 606(b).....5

PETITIONERS' REPLY BRIEF

To explain the need for review of the question presented here – *viz.*, whether this Court's decisions in *Mattox v. United States*, 146 U.S. 140 (1892), and *Remmer v. United States*, 347 U.S. 227 (1954), holding that improper ex parte contacts with a jury establish a rebuttable presumption of prejudice, remain good law – the petition for certiorari established four important points:

First, the federal circuits have expressed directly conflicting views on the question presented. Respondents do not dispute that point at all. *Second*, the lower courts refused to apply any presumption of prejudice to CSO Warrick's "bullet remark" to juror Graham, but instead required ExxonMobil to prove "actual" coercion. Respondents do not dispute that point at all. *Third*, Warrick's remark was an egregiously improper ex parte contact that would establish a rebuttable presumption of prejudice in the circuits that continue to apply *Mattox* and *Remmer*. Respondents do not dispute that point at all. *Fourth*, the question whether the presumption established by *Mattox* and *Remmer* should have been applied is important in that its answer could affect both the outcome below, and countless future cases.

It is only the final point with which respondents take issue in their brief in opposition. Respondents contend that this case, and every other case involving improper jury contacts, simply "turns on the facts" no matter what legal rule is applied, and therefore what is at issue is a factual finding not worthy of review by this Court.

Respondents are wrong. To begin with, they ignore the settled rule that any finding of fact "that is predicated on a misunderstanding of the governing rule of law" is legal error subject to plenary review and correction by this Court. *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984). Respondents do not even attempt to deny that the lower courts' "factual finding" that the jury in this case was not

"actually coerced" was predicated on a governing rule of law that directly conflicts with the rule enunciated in *Mattox* and *Remmer*. And if any case shows why the right rule matters, it is this case. Respondents' own brief further proves why the question of the continued validity of the *Mattox/Remmer* presumption is one of substantial importance in the administration of justice in the federal courts: respondents' catalogue of all the cases cited in the petition establishes that federal courts of appeals reverse jury verdicts affected by improper contacts almost *only* when they apply the presumption of prejudice. With that showing, respondents disprove their only real argument against review.

ARGUMENT

1. Before turning to their actual grounds for opposing review, respondents spend several pages arguing on the merits that the decision below is consistent with the "most recent of [this Court's] jury intrusion decisions." Opp. Br. at 16. Respondents cannot dispute, however, that the decision conflicts with *Mattox* and *Remmer* themselves, which held unambiguously that "any" ex parte communication with a juror is to be deemed "presumptively prejudicial," leaving the burden on the prevailing party to establish the harmlessness of the conduct. *Remmer*, 347 U.S. at 229. Whatever respondents may have to say about the effect of this Court's subsequent cases on *Mattox* and *Remmer*, only this Court can announce that those cases have been overruled. Pet. at 30. All that matters for present purposes is that the court below and four other federal circuits openly refuse to follow two controlling precedents of this Court because of principles suggested by subsequent precedents, while the remaining courts consider the subsequent precedents distinguishable and thus continue to treat *Mattox* and *Remmer* as controlling.

In any event, for all of respondents' mistimed argument on the merits in respect to this Court's "most recent jury intrusion decisions," respondents simply do not come to terms

with the two things about those decisions that most clearly suggest that they do not undermine the *Mattox/Remmer* rule in federal cases. First, as the petition points out, Pet. at 18-20, all of the more recent cases address only the question whether a hearing is sufficient to protect a party's fair-trial rights when juror misconduct is at issue. Not one of them considers the question whether prejudice may be proved at that hearing by way of a presumption. Respondents ignore that point.

Indeed, in the most recent case, and the case on which respondents most heavily rely, the Court *explicitly* declined to comment on the issue presented here, noting that whether proof of jury prejudice at the hearing rests solely on a "presumption of prejudice" or on a "specific analysis" of all the facts, the "ultimate inquiry" is whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict." *United States v. Olano*, 507 U.S. 725, 739 (1993). We do not disagree. The question here – unanswered in *Olano* – is simply whether that "ultimate inquiry" could be resolved by way of a presumption subject to rebuttal, or whether the party challenging the verdict would have to prove up actual prejudice before relief could be granted. Pet. at 20.

Second, as the petition pointed out, three of the subsequent cases on which courts have relied in declining to apply the *Mattox/Remmer* presumption are habeas cases which arose initially in state courts. Pet. at 20 n.6. Unless the *Mattox/Remmer* rule is itself a constitutional rule, then, the rule could *not* have been applied in those cases. Respondents ignore that point as well.

2. As for arguments against review rather than on the merits, respondents begin by attempting to invoke the "two-court rule," suggesting that the petition "ask[s] this Court to set aside the concurrent findings of no prejudice made by the two courts below, a task that the Court consistently and properly refuses to undertake." Opp. Br. at 15; *see id.* at 21

("the facts have been found by two lower courts and are no longer subject to debate in this Court"). And the very heart of their argument against review is that the question presented here is not important because "[o]n *the facts found by the courts below* the outcome of this case would have been no different in any other circuit." Opp. Br. at 15 (emphasis added). The factual finding on which they rely is the finding that CSO Warrick's "bullet remark" to Juror Graham resulted in "no prejudice" to ExxonMobil. *Id.*

That argument entirely misses the point. The very question presented for review here is whether or not the lower courts' "concurrent findings of no prejudice" from the bullet remark were "predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984). There is no contention here that the lower courts erred because they misread a document or misjudged the credibility of a witness. The question is whether they erred because they did not apply the proper legal standard – *i.e.*, the *Mattox/Remmer* rule – to the undisputed facts at hand.[1] That is a pure "question of law" subject to plenary review by this Court. *Bose Corp.*, 466 U.S. at 501; *see Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15 (1982) ("Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."); *Pullman-Standard Co. v. Swint*, 456 U.S. 273, 287 (1982) ("if a district court's [factual] findings rest on an erroneous view of the law, they may be set aside on that basis"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

---

[1] Respondents' contention that the petition's statement of the case "argues the facts de novo," Opp. Br. at 1, is thus seriously misplaced. The statement accurately reports the underlying facts relevant to the legal question at issue, as the *Mattox/Remmer* rule would frame it: whether the CSO Warrick's gun/bullet remark to Juror Graham gave rise to a "reasonable possibility of prejudice."

And the distinction between the *Mattox/Remmer* rule and the legal standard applied by the lower courts here in making their factual findings could hardly be more stark. The district court required ExxonMobil to bear the burden of proving that the conduct "actually coerced" the jury into reaching a verdict it would not otherwise have reached. As explained in the petition, that standard was literally an impossible one to meet, given that Fed. R. Evid. 606(b) strictly prohibits inquiries into actual, subjective effects of a contact on a juror's decisionmaking process.[2] The court's "finding" of "no prejudice," then, was in reality merely a finding that ExxonMobil had been unable to prove an actual impact on the jurors' thought processes given the extraordinary constraints of a rule that prohibits precisely that evidence.

Had it applied the *Mattox/Remmer* rule, by contrast, the court would have presumed prejudice from CSO Warrick's improper contact. The respondents, not ExxonMobil, then would have had the burden to prove that there was "no *reasonable possibility* that the verdict was affected by the contact." *United States v. Sanders*, 962 F.2d 660, 668 (7th Cir. 1992) (emphasis added; internal quotation marks omitted). As the underscored language suggests, the inquiry at this stage would have been an objective one, focusing on the likelihood that the contact *could* have affected the jury's de-

---

[2] Rule 606(b) prohibits a juror from testifying "to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith," although a juror may testify to the objective facts concerning the existence of ex parte contacts. Fed. R. Evid. 606(b). The rule merely codified one of the holdings in *Mattox*. *See* Pet. at 17. Respondents read this Court's opinion in *Rushen v. Spain*, 464 U.S. 114 (1983), as effectively amending Rule 606(b) and (again) overruling *Mattox*, in its suggestion that "the effect [of ex parte communications] on juror impartiality [is a] question[] of historical fact." Opp. Br. at 26 n.13 (quoting *Rushen*, 464 U.S. at 120-21 n.5). It is hard to see how *Rushen* could be taken as a comment on *Federal* Rule 606(b), however, inasmuch as *Rushen* was a *state* case arising in habeas.

liberations, rather than on the question whether the verdict was *actually* coerced.

The court did, however, implicitly "find" that Warrick's improper contacts did not "inherently coerce" the jury, as the predicate for refusing to apply a presumption of prejudice under the Ninth Circuit's Byzantine rules governing the presumption. *See* Pet. at 24-25. But the "inherent coercion" inquiry, while at least objective, is also a very different inquiry than *Mattox* and *Remmer* command. The objective standard courts apply under those cases is not whether there is "inherent" prejudice, but whether there is a "*reasonable possibility* of prejudice." Pet. at 29 & n.11. Even putting to one side the assignment of the burden of proof, it is surely much harder to prove that a particular contact is "inherently coercive" than that a contact creates a "reasonable possibility of prejudice."

This case proves the point. The court of appeals affirmed the trial court's finding of no actual coercion on the ground that CSO Warrick's remark "did not purport to tell the individual to whom it was directed, Juror [Graham], what his decision in the case ought to be or how he should make it." Pet. App. at 9a. But even if CSO Warrick's remark did not tell Graham what his decision ought to be, it is a very different question whether the remark created a "reasonable possibility of prejudice" in the jury's deliberations. It is not disputed that the jurors were receiving already enormous – even threatening – pressure from the community. Pet. at 5-6. It is not disputed that Rita Wilson was known by CSO Warrick to be in serious conflict with the other jurors in deliberations. Pet. at 6. It is not disputed that on the very day Warrick made his comment to Graham, the jury declared to the court that it was at impasse, and then again that same day – after the court refused to accept that declaration – that it was at a "crucial stage in our deliberation." Pet. at 7. And, it is not disputed that at this critical time, Juror Wilson was holding

out against the other jurors because she did not believe a punitive damage award was appropriate. Pet. at 9.

In view of those objective facts, respondents would have faced enormous difficulty in trying to prove there was *no* reasonable possibility that the deliberations were prejudiced by the nature and timing of CSO Warrick's comment. Indeed, the *only* "fact" cited by the lower courts in their "actual coercion" analysis that might possibly weigh against the reasonable possibility of prejudice was the conclusion that Juror Graham "perceived the remark as a tasteless joke rather than as a threat or serious suggestion." Pet. App. at 4a; *see id.* at 9a.

That supposed fact is wholly beside the point: no one has ever contended that Warrick was actually proposing a homicide.[3] ExxonMobil's contention from the beginning has been that Warrick's comment had the force and effect of "shoring up" Graham's views and thus his side of the deliberations – telling members of the majority, in effect, that court personnel believed they were in the right and that Juror Wilson was the one failing to do her job. Pet. at 28. The lower courts simply never addressed the reasonable possibility of that kind of prejudice to the deliberations – primarily because of their myopic focus on the question whether the comment "actually" coerced the jurors' $5 billion punitive damages verdict.

The lower courts' finding of "no prejudice" on the undisputed facts thus cannot be extricated from their application of a much tougher legal standard of proof than would have been required by *Mattox* and *Remmer*. For the reasons just discussed, if the courts had applied the *Mattox/Remmer* rule, they should have concluded that a sufficient threat of preju-

---

[3] In any event, Juror Graham never once said he thought the comment was a "joke," to be laughed off or ignored. He said, to the contrary, that it "totally freaked me out" and "really shook me up." Pet. at 7.

dice was shown to warrant a new trial.

In point of fact, respondents do not even try to deny that a different result would have been reached under the *Mattox/Remmer* rule. Their argument, rather, is that the Ninth Circuit's "finding" that ExxonMobil was not "actually" prejudiced would preclude a new trial no matter what rule was applied. Relying entirely upon that finding, they say this case raises no controversial issue because we have "cited no case where any court of appeals has ordered a new trial despite finding that an intrusion had no impact on the jury's deliberations." Opp. Br. at 23; *see also id.* at 26-27 n.13. That argument gets them nowhere: the whole point here is that the Ninth Circuit's finding "that [the] intrusion had no impact on deliberations" likely would have been different had the court applied the *Mattox/Remmer* rule. The court's finding under the rule it did apply says nothing about what the outcome would have been under the materially different rule enunciated in *Mattox* and *Remmer* and applied in other circuits. That is the only relevant question, and respondents do not speak to it at all.

3. The rather obvious potential that application of the *Mattox/Remmer* presumption would have made an outcome-determinative difference in this case also disposes of respondents' most overwrought claim: that the question of which party bears the burden to prove prejudice from an improper contact *never* makes a difference in *any* case. *See* Opp. Br. at 28 (the "presumption has no outcome-determinative consequences"); *see generally id.* at 24-29.

The notion that allocation of burden of proof cannot affect factual determinations has never been recognized by this Court in any context. Indeed, this Court's view is to the precise contrary: "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). Thus, just last Term this Court granted certiorari to decide the sole question

of which party bears the burden of proof on a tax claim in bankruptcy court. *Raleigh v. Illinois Dep't of Revenue*, 120 S. Ct. 1951 (2000). The Court has routinely treated allocation of the burden of proof as an important issue worthy of review. *See, e.g., Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994) (deciding which party bears burden of proof in black lung benefits claim); *Medina v. California*, 505 U.S. 437 (1992) (deciding which party bears burden of proof on defendant's competence to stand trial); *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (deciding whether government or citizen bears burden of proof on question of voluntariness of act of expatriation).

Respondents' own brief confirms beyond any doubt that the question of who bears the burden of proof can and does make a difference in this context. According to respondents' tally of the forty-one cases cited in the petition, courts granted a new trial in eleven cases.[4] In nine of those eleven, the courts applied a presumption of prejudice.[5] By contrast, only two of the forty-one total cases found prejudice in the absence of any presumption. The upshot is clear: unless a presumption of prejudice applies, it is all but impossible to prove the actual prejudice necessary to obtain a new trial even after egregiously improper ex parte jury contacts.

On the other hand, the fact that there are several cases in

---

[4] These numbers include *Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983), which is cited in the petition but apparently not included in respondents' tally.

[5] The cases cited from the Ninth Circuit either were decided when that Circuit followed *Mattox* and *Remmer*, *see Rinker*, *supra*; *United States v. Littlefield*, 752 F.2d 1429 (9th Cir. 1985), or in a case that involved facts under which the presumption arises in accordance with the Ninth Circuit's balkanized rules governing the existence of the presumption, *see United States v. Dutkel*, 192 F.3d 893 (9th Cir. 1999) (presumption applies to jury tampering, even though it is not extraneous information).

which the presumption was applied but the court went on to find no reasonable possibility of prejudice, Opp. Br. at 25-26, simply goes to show the practical workability of the *Mattox/Remmer* framework. The Ninth Circuit's opinion argues at length that a presumption of prejudice should not apply to ex parte contacts because many such contacts are innocuous social contacts, which frequently arise in long trials and in small communities. Pet. App. at 9a-10a. But in any case where the contact is truly innocuous, the presumption should be easily dispelled, assuming such contact is even "improper" in the first place. *Cf.* Pet. at 22 (discussing Fourth Circuit rule). And even where it is not entirely innocuous, courts still may find that there was in fact no reasonable possibility that the verdict was affected, after a full investigation of all the objective facts surrounding the incident, including its exact nature, its timing in relation to the deliberations, and similar factors. *See* Pet. at 29 n.11 (identifying objective factors courts use to evaluate possibility of prejudice).

Though it is mandated by this Court's cases, neither court below imposed on respondents the burden of proving that there was no reasonable possibility that this $5 billion verdict was affected by Warrick's improper conduct. While we are confident of what the outcome would have been had they done so, that is not the immediate point. What matters for present purposes is that "the burden of proof was critical to the resolution of the case," *Raleigh*, 120 S. Ct. at 1954, as it surely has been and will continue to be in many others. The abiding controversy in the federal circuits over the continued vitality of *Mattox* and *Remmer* is well-presented on the facts of the case. This Court should grant review and settle that controversy now.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

Respectfully submitted,

WALTER E. DELLINGER
(*Counsel of Record*)
JOHN F. DAUM
PAMELA A. HARRIS
JONATHAN D. HACKER
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

Attorneys for Petitioners

Dated: September 1, 2000

contractor defense established, such an analysis would have been consistent with that of every other circuit court to address the issue. *See Lewis*, 985 F.2d at 89; *Ramey v. Martin-Baker Aircraft Co., Ltd.*, 874 F.2d 946, 951 n.9 (4th Cir. 1989); *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233, 108 S. Ct. 2897, 101 L. Ed. 2d 930 (1988). Certainly, evidence of a governmental decision — when confronted with the very design defect that plaintiff alleges — to address the problem through pilot instructions, rather than through a design change, is consistent with *Boyle*'s recognition that "[t]he design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design." 487 U.S. at 513, 108 S. Ct. at 2519.

CONCLUSION

Both the district court and the Fifth Circuit correctly stated and applied the government contractor defense standard set forth in *Boyle*. Furthermore, the result is consistent with the policy rationale underlying the defense. There is no conflict between the lower courts' holdings in this case and this Court's opinion in *Boyle*. Nor is there a conflict among the circuit courts of appeal on any issue raised by Petitioner. In substance, Petitioner's complaint is not with the correctness of the legal standards applied, but rather with the result that those legal standards require in this case. There being no basis in law or in fact for further review of this case, Beech respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

Of Counsel:

WILLIAM L. OLIVER, JR.
MARTIN PRINGLE, OLIVER, WALLACE & SWARTZ, L.L.P.
100 N. Broadway, Suite 500
Wichita, Kansas 67202
(316) 265-9311

RICHARD H. CALDWELL
Counsel of Record
GREG WALLER
MAYOR, DAY, CALDWELL & KEETON, L.L.P.
700 Louisiana, Suite 1900
Houston, Texas 77002
(713) 225-7000

Attorneys for Respondents Beech Aircraft Corporation, Raytheon Aircraft Company, Beech Aerospace Services, Inc. and Raytheon Aerospace Company